

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

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In the Matter of:)	Docket No. CWA-01-2010-0014
)	
Crabtree Development, LLC)	Administrative Complaint
)	Proposing to Assess a Civil
R.A. Powell Construction Corp.)	Penalty Under Section 309(g)
)	of the Clean Water Act
_____)	

I. STATUTORY AND REGULATORY AUTHORITY

1. This Administrative Complaint (“Complaint”) is issued under the authority vested in the U.S. Environmental Protection Agency (“EPA” or “Complainant”) by Section 309(g) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation, Termination or Suspension of Permits,” 40 C.F.R. §§ 22.1-22.52 (“the Consolidated Rules of Practice”).

2. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice, Complainant hereby provides notice of a proposal to assess a civil penalty against Crabtree Development, LLC (“Crabtree Development”) and R.A. Powell Construction Corp. (“Powell Construction”) (collectively “Respondents”) for discharging pollutants into navigable waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and failing to apply for a National Pollution Discharge Elimination System (“NPDES”) permit in violation of Section 308(a) of the CWA, 33 U.S.C. § 1318(a).

3. The CWA is designed to restore and maintain the chemical, physical and biological integrity of the nation's waters. Section 101(a) of the CWA, 33 U.S.C. § 1251(a).

4. To accomplish the objectives of the CWA, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person except in certain circumstances, including a discharge in compliance with a permit issued pursuant to Section 402 or 404 of the CWA, 33 U.S.C. § 1342 or 1344.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

6. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, dredged spoil, garbage, rock, sand and cellar dirt.

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

8. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

9. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines "person" to include "an individual, corporation, [or] partnership."

10. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires any storm water discharges "associated with industrial activity" to be authorized by a NPDES permit.

11. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), authorizes EPA to require the owner or operator of any point source to provide such information as EPA may

reasonably require to carry out the objectives of the CWA, including the issuance of NPDES permits pursuant to CWA section 402, 33 U.S.C. § 1342.

12. Pursuant to Sections 301, 308, 402, and 501, 33 U.S.C. §§ 1311, 1318, 1342 and 1361, EPA promulgated storm water discharge regulations at 40 C.F.R. § 122.26.

13. Forty C.F.R. 122.26(c) requires dischargers of storm water associated with “industrial activity” to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

14. Forty C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity” to include storm water discharges from construction activities, including clearing, grading, and excavation activities, that result in a disturbance of five or more acres of total land area.

15. Forty C.F.R. § 122.26(b)(13) defines “storm water” to include storm water runoff, snow melt runoff, and surface runoff and drainage.

Construction General Permit

16. In February 1998, EPA issued a final NPDES General Permit for Storm Water Discharges From Construction Activities (“Construction General Permit” or “CGP”). 63 Fed. Reg. 7858 (Feb. 17, 1998). The 1998 CGP was effective February 17, 1998 and expired February 17, 2003. EPA issued a new CGP in July 2003, 68 Fed. Reg. 39087 (July 1, 2003), and for the Commonwealth of Massachusetts in August 2003, 68 Fed. Reg. 45817 (August 4, 2003) (Massachusetts Permit Number: MAR100000) (“2003 CGP”).¹ The 2003 CGP was effective July 1, 2003 and expired July 1, 2008. EPA

¹ Although the 2003 CGP did not become effective in Massachusetts until August 4, 2003, *see* 68 Fed. Reg. 45817 (Aug. 4, 2003), large construction activities in Massachusetts were covered under the 1998
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issued a new CGP for new and unpermitted ongoing dischargers effective June 30, 2008 (“2008 CGP”), 73 Fed. Reg. 40338 (July 14, 2008) (Massachusetts Permit Number: MAR100000), and subsequently extended the term of the 2008 CGP to June 30, 2011, 75 Fed. Reg. 4554 (Jan 28, 2010). The 2008 CGP authorizes, subject to conditions contained therein, the discharge of pollutants in storm water runoff associated with construction activities, including construction activities within the Commonwealth of Massachusetts.

17. To obtain coverage under the 2003 CGP, Part 2 of the 2003 CGP required “operators” to submit a notice of intent (“NOI”). To obtain coverage under the 2008 CGP, Part 2.1 of the 2008 CGP requires “operators” to submit a complete and accurate NOI. Both the 2003 CGP and the 2008 CGP define “operator” as “any party associated with a construction project” that has either “operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications” or “day-to-day operational control of those activities at a project which are necessary to ensure compliance with a SWPPP [storm water pollution prevention plan] for the site or other permit conditions.”

18. Part 2.3.A of the 2003 CGP required operators of new projects to submit a complete and accurate NOI prior to commencement of construction activities. Part 2.4.C of the 2008 CGP requires operators of unpermitted ongoing projects to submit an NOI within 90 days of the issuance date of the 2008 CGP. Part 2.4.D of the 2008 CGP allows operators to submit NOIs after the commencement of construction activities, but reserves to EPA the right to take enforcement action for any unpermitted discharges that occur between the commencement of construction and discharge authorization.

CGP until that date. *See* 68 Fed. Reg. 39089. Additionally, the 2003 CGP was modified on December 22, 2004, effective on January 21, 2005. *See* 69 Fed. Reg. 76743 (Dec. 22, 2004).

19. Part 3 of the 2003 CGP and Part 5 of the 2008 CGP require operators to prepare an adequate storm water pollution prevention plan (“SWPPP”) addressing the portions of the project for which they are operators. Among other things, the SWPPP must describe the nature of construction activity and document control measures, including best management practices (“BMPs”) designed to eliminate, to the extent feasible, the migration of pollution from construction sites into the nation’s waters. 2003 CGP Part 3.5; 2008 CGP Part 5.3. These practices include measures to prevent erosion (such as the scheduling of the project to minimize the amount of land that is being graded at any particular time) and measures to capture sediment before it leaves the site (such as silt fences and sedimentation basins). The permits impose additional requirements, including those for inspection of the site during construction, maintenance of the SWPPP and sometimes other records at the site, and final stabilization of the site followed by termination of permit coverage.

II. ALLEGATIONS

20. Pingry Hill is a residential development located along Snake Hill Road in Ayer, Massachusetts (“the Site”). The Site is approximately 135 acres. Approximately 31 acres have been disturbed during construction of the Site.

21. Crabtree Development is a Massachusetts Limited Liability Company formed on or about November 14, 2007 with its principal place of business located at 13 Fox Run Drive in Ayer, Massachusetts and is a “person” as defined at Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

22. The Site is owned in part by Crabtree Development. According to its response to EPA's Information Request, Crabtree Development has been the principal developer of

the Site since 1997 and has been the developer at all times that construction activity was occurring.

23. Crabtree Development controls the plans and specifications for the construction of the Site, and otherwise meets the definition of “operator” of the Site as defined at 40 C.F.R. § 122.2 and Appendix A of both the 2003 CGP and 2008 CGP.

24. Powell Construction is a Massachusetts corporation formed on June 4, 2003 with its principal place of business located at 259 Leominster-Shirley Rd., Lunenburg, MA and is a “person” as defined at Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

25. Powell Construction is the general contractor for the Site and has day-to-day operational control of activities at the Site and otherwise meets the definition of “operator” of the Site as defined at 40 C.F.R. § 122.2 and Appendix A of both the 2003 CGP and 2008 CGP.

26. Earth disturbing activities at the Site began on or about September 27, 2007. These activities constituted the “commencement of construction” at the Site, as defined in Appendix A of the 2003 CGP and 2008 CGP.

27. Storm water runoff from the western portion of the Site drains north through wetlands to an unnamed stream that flows west into a brook (possibly known as “Day Brook”) that immediately empties into Grove Pond. Grove Pond drains immediately to Plowshop Pond which is drained by Nonacoicus Brook. Nonacoicus Brook drains into the Nashua River. The Nashua River drains into the Merrimack River, which drains into the Atlantic Ocean.

28. Storm water runoff from the southern portion of the Site drains to Bennetts Brook, which flows east to Spectacle Pond where it becomes Gilson Brook and empties into

Forge Pond. Downstream from Forge Pond, the brook is known as Stony Brook, and it drains into the Merrimack River, which drains into the Atlantic Ocean.

29. Grove Pond, Plowshop Pond, Nonacoicus Brook, Nashua River, Bennetts Brook, Spectacle Pond, Gilson Brook, Forge Pond, Stony Brook, the Merrimack River and the Atlantic Ocean are all “waters of the United States,” as defined at 40 C.F.R. § 122.2, and therefore are “navigable waters,” as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

30. Storm water runoff has been contaminated with sand, dirt, sediment, suspended solids, residues of construction material, and turbidity. The sand, dirt, sediment, suspended solids, residues of construction material, and turbidity constitute “pollutant[s]” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

31. Storm water runoff has been conveyed through ditches, culverts, swales, gullies, and channels through disturbed areas of the Site. These ditches, culverts, swales, gullies, channels and the storm water collection system discharging pollutants constitute “point source[s]” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

32. The storm water discharges from the Site have resulted in the “discharge of pollutants,” as defined at Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

33. Since commencement of construction, Crabtree Development and Powell Construction have participated in or directed construction activities at the Site, including clearing, grading, and excavation activities that have resulted in the disturbance of greater than five acres of total land area.

34. These construction activities constitute “industrial activity” within the meaning of 40 C.F.R. § 122.26(b)(14).

35. The storm water discharges from the Site are “storm water discharges from an industrial activity,” as defined at 40 C.F.R. § 122.26(b)(14)(x).

36. Construction activities at the Site have therefore resulted in the discharge of “storm water associated with industrial activity” to waters of the United States.

37. As “operators” of the Site, Crabtree Development and Powell Construction were required to obtain NPDES permit coverage for the construction activities and then comply with all requirements and conditions for operation under the CWA, its regulations and the applicable permit.

38. Crabtree Development has not applied for an individual permit and did not submit an NOI to have storm water discharges from the Site authorized by the CGP until January 5, 2010.²

39. Powell Construction has not applied for an individual permit and has not submitted an NOI to have storm water discharges from the Site authorized by the CGP.³

COUNT 1: UNAUTHORIZED DISCHARGE OF STORM WATER ASSOCIATED WITH INDUSTRIAL ACTIVITY

40. The Complaint incorporates Paragraphs 1-39 above by reference.

41. By discharging storm water associated with industrial activity at the Site during storm events from September 27, 2007 to January 11, 2010 without authorization under

² Another developer, Pulte Homes of New England, LLC (“Pulte”), submitted an NOI for the Site on February 28, 2006. However Pulte ended its involvement with the Site prior to the commencement of construction and was therefore not an “operator” within the meaning of 40 C.F.R. § 122.2 and the 2003 CGP and 2008 CGP.

³ Another general contractor, C. J. Mabardy, Inc. (“Mabardy”), submitted an NOI for the Site on February 28, 2006. However Mabardy ended its involvement with the Site prior to the commencement of construction and was therefore not an “operator” within the meaning of 40 C.F.R. § 122.2 and the 2003 CGP and 2008 CGP.

any NPDES permit, Crabtree Development was in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

42. By discharging storm water associated with industrial activity at the Site during storm events from September 27, 2007 to present without authorization under any NPDES permit, Powell Construction was, and continues to be, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

COUNT 2: FAILURE TO APPLY FOR A NPDES PERMIT

43. The Complaint incorporates Paragraphs 1-39 above by reference.

44. By failing to timely apply for an individual permit or submit an NOI for coverage under the CGP, Crabtree Development was in violation of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), from September 27, 2007 to January 11, 2010.

45. By failing to timely apply for an individual permit or submit an NOI for coverage under the CGP, Powell Construction was in violation of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), from September 27, 2007 to present.

III. NOTICE OF PROPOSED ASSESSMENT OF CIVIL PENALTY

46. Based on the foregoing allegations and pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g); the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, et seq.; the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, et seq.; and the Civil Monetary Penalty Inflation Adjustment Rule, 73 FR 75340 (Dec. 11, 2008) (codified at 40 C.F.R. Part 19), Complainant proposes that a Final Order assessing civil penalties be issued against Respondents of up to eleven thousand dollars (\$11,000) per day for each day during which the violations continued through January 12,

2009 and up to sixteen thousand dollars (\$16,000) per day for each day during which the violations continued after January 12, 2009, up to a maximum of one hundred and seventy-seven thousand and five hundred dollars (\$177,500), taking into account the nature, circumstances, extent and gravity of the violation, or violations, and the Respondents' prior compliance history, the degree of culpability for the cited violations, any economic benefit or savings accruing to the Respondents resulting from the violations, the Respondents' ability to pay the proposed penalty, and such other matters as justice may require.

47. The violations alleged represent significant violations of the CWA because of the extent and duration of the violations and because compliance with the federal storm water program is important to ensuring that storm water runoff does not contribute to the impairment of water quality.

48. Based on a threshold of 0.5 inches of rain for a discharge, there were at least 67 individual days from September 2007 to November 2009 during which a discharge of storm water from the Site occurred in violation of the CWA. In addition, Respondent Crabtree Development failed to apply for an individual permit or submit an NOI for coverage under the CGP from September 27, 2007 to January 11, 2010, in violation of the CWA, and Respondent Powell Construction failed to apply for an individual permit or submit an NOI for coverage under the CGP from September 27, 2007 to present, in violation of the CWA.

49. Prior to any hearing on this case, EPA will file a document specifying a proposed penalty for the CWA violations and explaining how the proposed penalty was calculated, as required by the Consolidated Rules of Practice.

IV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

50. Each Respondent has the right to request a hearing to contest the issues raised in this Complaint. Any such hearing would be conducted in accordance with the Consolidated Rules of Practice. Any request for a hearing must be included in Respondent's written Answer to this Complaint and filed with the Regional Hearing Clerk at the address listed below within 30 days of receipt of this Complaint.

51. In its Answer, each Respondent may also: (1) dispute any material fact in the Complaint; (2) contend that the proposed penalty is inappropriate; or (3) contend that it is entitled to judgment as a matter of law. The Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint of which Respondent has any knowledge. If Respondent has no knowledge of a particular factual allegation and so states, the allegation is considered denied. The failure to deny an allegation constitutes an admission of that allegation. The Answer must also include the grounds for any defense and the facts Respondent intends to place at issue.

52. The original and one copy of the Answer, as well as a copy of all other documents which a Respondent files in this action, must be sent to:

Wanda I. Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region I
5 Post Office Square - Suite 100
Mailcode ORA18-1
Boston, MA 02109-3912

53. Respondents should also send a copy of the Answer, as well as a copy of all other documents that Respondents file in this action, to Joanna Jerison, the attorney assigned to represent EPA and who is designated to receive service in this matter, at:

Joanna Jerison, Legal Enforcement Manager
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US EPA, REGION 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

U.S. Environmental Protection Agency - Region I
5 Post Office Square - Suite 100
Mailcode OES04-2
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Tel: (617) 918-1781
jerison.joanna@epa.gov

54. If any Respondent fail to file a timely Answer to this Complaint, it may be found to be in default, which constitutes an admission of all the facts alleged in the Complaint and a waiver of the right to a hearing.

V. CONTINUED COMPLIANCE OBLIGATION

55. Neither assessment nor payment of a civil penalty pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), shall affect any Respondent's continuing obligation to comply with the CWA, the regulations promulgated thereunder, or any other applicable Federal, State or local law.

Date: 06/10/10

Susan Studlien
Susan Studlien
Director, Office of Environmental Stewardship
U.S. Environmental Protection Agency
Region I